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No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HANSON SAVINGS AND LOAN, INC.,
Petitioner,

v.

STATE OF MARYLAND and STATE OF MARYLAND
DEPOSIT INSURANCE FUND CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Amendment to the Constitution of the United States bars a suit in federal court against a state by one of its own citizens.

2. Whether the state consented to suit and whether MDIF is a state agency.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fourth Circuit are listed in the caption except Second National Building and Loan Association which (we understand) will not join in this Petition nor file a separate Petition. Petitioner has no parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John Hanson Savings and Loan, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this matter on February 24, 1987.

OPINIONS BELOW

The February 24, 1987 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unpublished and is reprinted in the separate Appendix to this petition, pp. 1a-3a. The prior unpublished opinion of the United States District Court for the District of Maryland, is reprinted in the Appendix, pp. 4a-17a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh Amendment to the Constitution of the United States, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

a. Nature of the Case

Petitioner, John Hanson Savings and Loan, Inc.[1] ("John Hanson"), seeks review of the affirmance by the United States Court of Appeals for the Fourth Circuit of a judgment entered by the United States District Court for the District of Maryland in favor of the State of Maryland ("State") and State of Maryland Deposit Insurance Fund Corporation ("MDIF"), appellees and defendants below, against John Hanson, appellant and plaintiff below, granting the State and MDIF's motion to dismiss or for summary judgment. The Court of Appeals and District Court both entered judgment entirely on the basis that the Eleventh Amendment barred the trial court from entertaining John Hanson's claims. The Court of Appeals ruled that MDIF was a state agency and that the Eleventh Amendment barred any actions in federal court against it as well as against the State of Maryland.

b. Course of Proceedings

John Hanson filed suit against the State of Maryland and MDIF seeking the return of monies it contributed to the Central Reserve Fund ("CRF")[2] and

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[1] John Hanson Savings and Loan, Inc. converted from a Maryland chartered savings and loan to a federal savings bank in August, 1986 and is now known as John Hanson Savings Bank, F.S.B. It was named for the first "President of the United States in Congress Assembled".

[2] Subsequent to John Hanson's appeal to the Court of Appeals, but prior to argument before the Court, the State and MDIF returned to John Hanson its contributions to the CRF. The claims relating to those funds are, therefore, not before this Court.

Central Insurance Fund ("CIF") of Maryland Savings Share Insurance Corporation ("MSSIC"), which was a private mutual insurance corporation created by the Maryland legislature to insure the deposits of Maryland chartered thrift institutions. John Hanson raised claims premised on an unconstitutional taking of its monies, an unconstitutional impairment of contract and an unconstitutional interference with contract under the United States Constitution; breach of contract and accounting under Maryland law; and unconstitutional taking, unconstitutional special law, unlawful debt and illegal corporation under the Maryland Constitution and Maryland Declaration of Rights. The State and MDIF filed a motion to dismiss or in the alternative, for summary judgment. The motion was opposed by John Hanson. Thereafter, John Hanson moved for summary judgment.

c. Disposition of Proceedings

On August 1, 1986 the District Court entered its Memorandum and Order granting the motion to dismiss or for summary judgment of the State and MDIF. John Hanson appealed from the Memorandum and Order to the Court of Appeals.

On February 24, 1987 the Court of Appeals affirmed the District Court's Memorandum and Order in an unpublished per curiam opinion.

d. Statement of Facts

1. John Hanson was a Maryland state-chartered savings and loan association which has now converted to a federal savings bank and is now known as John Hanson Savings Bank, F.S.B., with its principal offices located in the State of Maryland. John Hanson is engaged in interstate banking throughout the

United States, has offices in Maryland and Delaware, and is federally insured.

2. MDIF is a Maryland corporation chartered on May 18, 1985, pursuant to Title 10, Financial Institutions Article, Annotated Code of Maryland (Chapter 6, Acts 1985, 1st Spec. Sess.) (the "Act"). MDIF is the successor by merger to the Maryland Savings Share Insurance Corporation ("MSSIC"). MDIF was created by the Maryland Legislature for the purpose of insuring the deposits in savings and loan associations.

3. Prior to the merger of MSSIC into MDIF, John Hanson was a member of MSSIC.

4. MSSIC was established as a non-profit, non-stock corporation pursuant to Title 10, Financial Institutions Article, Annotated Code of Maryland (1980) which was repealed by the Act. The members of MSSIC were savings and loan associations incorporated under the laws of the State of Maryland and any other savings and loan association authorized to do business in the State of Maryland having its principal office in the State of Maryland and having seventy-five percent (75%) of its total assets invested in accordance with the provisions of Title 9, FI, Code (1980), *supra*. The purposes of MSSIC were to (1) promote the elasticity and flexibility of the resources of its members; (2) provide for the liquidity of its members through a central reserve fund; and (3) insure the savings accounts of members. Section 10-103, FI, Code (1980), *supra*. Title 10, FI, Code (1980), *supra*, provided that MSSIC was to establish a Central Insurance Fund ("CIF").

5. Under former Title 10, the members of MSSIC were entitled to vote in the election of directors and

other matters. Section 10-108(a), FI, Code (1980), *supra*. The Board of Directors of MSSIC consisted of eleven (11) directors, of whom eight (8) were elected by the member associations and only three (3) were appointed by the Governor of Maryland. Section 10-109(b), FI, Code (1980), *supra*. Thus, the members of MSSIC controlled the activities of the corporation.

6. Under the Act, the Board of Directors of MDIF consists of eleven (11) directors, only five (5) of which are to be elected by the member associations. The remaining six (6) directors are appointed by the Governor of Maryland. Section 10-103, FI, Code (1985), *supra*. Thus, the rights and powers of the members have been diluted to a minority position under the Act.

7. The Act further provided that MDIF was to establish a separate fund entitled the "Maryland Deposit Insurance Fund" ("MDIF Fund"):

> "§10.110.
>
> (A)(l) The moneys of the Maryland Deposit Insurance Fund Corporation shall be maintained in a special nonlapsing fund, to be called the 'Maryland Deposit Insurance Fund'.
>
> (2) The fund director shall administer the Maryland Deposit Insurance Fund for the purposes of:
>
> (i) Insuring the savings accounts of member associations;
>
> (ii) Purchasing capital instruments, including net worth certificates, issued by a

member association to enable that member association to qualify for federal insurance;

(iii) Reimbursing savings account holders for loss incurred upon liquidation of a member association, up to the amount of insurance on any savings account; and

(iv) providing funds for liquidity to a member association in an emergency.

(b) The amount of loss to be protected against for each depositor may not exceed the limit established from time to time by the rules and regulations of the fund. This limit may not exceed the amount of federal insurance."

8. The Board of Directors of MDIF was required by the Act to adopt By-Laws and Rules and Regulations. Section 10-103(d)(4), FI, Code (1985), *supra*. The Board of Directors of MDIF adopted the former By-Laws and Rules and Regulations of MSSIC as and for its own By-Laws and Rules and Regulations.

9. The CIF was established to insure the savings accounts of member associations. Section 10-105(A), FI, Code (1980), *supra*. Each member association was required to contribute as a capital deposit with MSSIC (and now MDIF) a sum equal to two percent (2%) of its free share accounts. Rules and Regulations Section 3-301. MSSIC (and now MDIF) issued certificates of deposit to its member associations for all capital deposits made. As of December 31, 1985, the CIF had total assets of approximately $174,000,000.00. As of December 1, 1985, John Hanson held $10,514,600.00 in certificates of deposit representing its capital deposits to the CIF. Repayment of a member associa-

tion's capital deposits to the CIF is to be made pursuant to Rules and Regulations Section 3-503, which provides:

> "Any member withdrawing from the Corporation pursuant to the provisions of this section of these Rules shall be entitled to receive from the Corporation payment of the certificate of deposit issued by the Corporation and owned by such member less any debts or obligations owed by such member to the Corporation (such amount being hereinafter referred to as the 'net deposit') in the following manner:
>
> (A) A date shall be specified by the Corporation for the termination of insurance of free share accounts issued by the withdrawing members, which date shall not be later than twelve months from the date of the notice referred to in Section 3-501 (such date being referred to in these Rules as the 'terminal date').
>
> (B) A fraction as of the terminal date shall be determined, the numerator thereof being the total cash owned by the Corporation and the denominator thereof being the total assets (including cash) of the Corporation. Such fraction shall then be applied to the net deposit of the withdrawing member, and there shall be determined thereby the amount of cash that will be delivered to the withdrawing member as provided by the subsections of this Rule immediately following.

(C) The terminating member shall be entitled to receive its pro rata share of the cash of the Corporation as determined by Section 3-503(b) on the terminal date.

(D) The terminating member shall be entitled to receive on the terminal date a certificate of fractional participation, such certificate to be in a face amount equal to the net deposit of the terminating member less the cash received by such member in accordance with Section 3-503(C).

(E) The certificate of fractional participation received by a terminating member in accordance with Section 3-503(D) shall entitle the holder thereof to its proportionate share of any proceeds resulting from the liquidation of such remaining assets as they are liquidated by the Corporation. Such certificate shall describe the assets to which it relates only by symbols, and the Corporation shall, after the issuance of such certificate, designate such assets on its records by like symbols. Such certificate shall not entitle the holder thereof to any control over the manner, amount or date of liquidation of such assets. The Corporation shall not reveal any information relative to such remaining assets other than the extent of liquidation of the assets to which such certificate relates. The Corporation in final settlement of a withdrawing member's net deposit may either pay to the withdrawing member in lieu of such certificate such sum in cash as may be agreed upon as the reasonable value thereof, or, at

> any time after the issuance of such certificate, may purchase the same for such sum in cash as may then be agreed upon as the reasonable value thereof.

10. On April 23, 1985, the Board of Directors of John Hanson passed a resolution authorizing the submission of an application to the Federal Home Loan Bank for Federal insurance coverage from the Federal Savings and Loan Insurance Corporation ("FSLIC"). Pursuant to Rules and Regulations 3-501, John Hanson gave notice to MSSIC on April 25, 1985, of its intention to withdraw from MSSIC.

11. On September 19, 1985, John Hanson was accepted into the membership of FSLIC. On September 25, 1985, John Hanson requested payment of its Capital Notes in accordance with Rules and Regulations Section 3-901(B)(6) and (K).

12. On November 12, 1985, MDIF responded to the September 25, 1985 request of John Hanson for payment. The response, in pertinent part, denied John Hanson's request and refused to pay the Capital Notes. The refusal to pay was premised upon two grounds:

> "First, I would like to advise you that recent legislation enacted by the General Assembly has altered the rights of former Maryland Savings-Share Insurance Corporation institutions to receive—under previous applicable by-laws—these funds now held by the Maryland Deposit Insurance Fund Corporation ("MDIF").
>
> Second, I would like to refer you to Resolution 85-1 which states:

"The Board of Directors of the State of Maryland Deposit Insurance Fund Corporation hereby adopts the following resolution:

A. Because of the extent of currently anticipated losses, MDIF will not return capital deposits in the insurance fund to withdrawing members until the amount of currently anticipated losses is determined.

This resolution was approved by the MDIF Board and its special meeting on October 24, 1985."

13. On September 23, 1985, John Hanson mailed a letter to all of its depositors in accordance with Rules and Regulations Section 3-504 advising them that their accounts were federally insured as of September 19, 1985.

14. As of September 25, 1985, John Hanson was entitled to the return of its contributions to the CIF as it had taken all steps necessary to withdraw from MDIF.

15. Since succeeding MSSIC, MDIF disbursed or pledged additional liquid assets in the CIF to various MDIF-insured associations that had not been able to qualify for FSLIC membership. As a result of those disbursements, the liquid assets in the CIF had been reduced as of August 31, 1985 to $56,201,000.00.

16. While disbursing and pledging assets in the funds as described above, MDIF has failed and refused to make any repayments to John Hanson of its deposits to the CIF.

17. In administering the CIF, MDIF has failed to manage the assets in these funds in a responsible and

professional manner. MDIF has failed to establish any procedure to assure that payments made on the collateral posted with MDIF by member associations to the CIF are in fact made to MDIF or even accounted for by MDIF. As a result, there is no assurance that the cash flow generated by such collateral has been or will be available to MDIF in the event of a default by any member association on the loans made to it by MDIF.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH AMENDMENT DOES NOT BAR A SUIT IN FEDERAL COURT AGAINST A STATE BY ONE OF ITS OWN CITIZENS.

In recent years an increasingly vocal minority of this Court has correctly explained the true intent of the Eleventh Amendment and shown that it does not bar suits such as the case at bar.

In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), this Court considered a class action suit seeking an injunction against state officials for the violation of rights of mentally retarded individuals. A divided court (5-4) held that the Eleventh Amendment barred suit against state officials in federal court for state law violations. Justice Brennan dissented on the basis that the Eleventh Amendment barred only suits against a state by citizens of other states. Justices Stevens, Marshall and Blackmun joined in his dissent on the ground that a state's sovereign immunity does not prevent a federal court from enjoining conduct which the state itself has prohibited.

In *Green vs. Mansour*, 106 S.Ct. 423 (1985) a divided court (5-4) held that claims for a declaratory judgment

and notice of relief which related to a state official's past violations of federal law were barred by the Eleventh Amendment. The dissent expressed the view that as the disputes presented were between citizens and their own state and jurisdiction was pursuant to a federal question, the Eleventh Amendment would not bar the actions.

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), a divided Court (5-4) held that a suit in federal court against a state by a litigant seeking monetary relief under Section 504 of the Rehabilitation Act of 1973 was barred by the Eleventh Amendment. The dissent, expressed the view that the Eleventh Amendment did not bar suit against a state by its own citizens and suggested that the Court should take advantage of the opportunity provided in that case to re-examine the doctrine's historical and jurisprudential foundations.

Likewise, the case at bar provides an opportunity for this Court to re-examine and evaluate the Eleventh Amendment's historical and jurisprudential foundations.

Most recently in *Papasan v. Allain*, 106 S.Ct. 2932 (1985) a divided court (5-4) held that the Eleventh Amendment barred an action in federal court arising out of a breach of trust claim involving Mississippi school land grants. The dissent adopted the same reasons for its dissent as set forth in *Atascadero State Hospital v. Scanlon, Id.*

John Hanson is in agreement with the rationale adopted by the dissenters in the foregoing cases. The Eleventh Amendment was never intended to bar a suit in federal court against a state or state agency

by one of the state's own citizens. The egregious results arising from such a bar are especially evident in a case such as this where a state has wrongfully seized property belonging to one of its citizens in violation of both the federal and state constitutions. The district court in this instance had jurisdiction premised upon a federal question, the violation of provisions of the United States Constitution. As explained below, the Court of Appeals erred in holding that MDIF was a state agency and that the state had not consented to the suit, but even were the Court correct on those points, it was still improper to apply the Eleventh Amendment in this case for those reasons adopted by the dissenters above.

II. THE STATE CONSENTED TO SUIT AND MDIF IS NOT A STATE AGENCY.

This case presents the question of whether the Eleventh Amendment bars a suit in federal court by a savings and loan stock corporation against a state formed savings and loan insurance corporation, which is the successor by merger to a private savings and loan insurance corporation.

The Court of Appeals decided that MDIF is a state agency and that the State has not consented to a suit against MDIF in federal court. The Court of Appeals also held that the Eleventh Amendment bars any action, whether legal or equitable, against the State of Maryland without its consent.

The doctrine of sovereign immunity, as applicable by virtue of the Eleventh Amendment's prohibition of suit against a state without the state's consent, is intended to protect the state's treasury and to prohibit interference with proper governmental functions.

Application of the Eleventh Amendment was not intended to and cannot be applied to insulate the state's agencies and officials from suit to recover property wrongfully seized.

Aside from the legal error in the Court of Appeals' decision, the practical implications of its holding are nothing less than alarming. In effect, the Court of Appeals would immunize the State from any financial responsibility whenever it chooses in the guise of the legitimate exercise of its sovereign powers to transfer private property from a private entity into an existing or newly created corporation purported to be an agency of the State. If this decision stands, the State then would have a judicially recognized *de facto* power of condemnation without any concomitant requirement to afford adequate compensation since no party could sue it to recover the property that had been expropriated.

Nevertheless, the law recognizes subterfuge and reacts accordingly. Application of the doctrine of sovereign immunity under the circumstances of this case does not apply as a matter of law, and accordingly, the case should not have been dismissed on Eleventh Amendment grounds.

Eleventh Amendment immunity is unavailable in this action as those rights have been waived and MDIF is not a state agency to which the Eleventh Amendment applies. Furthermore, the Eleventh Amendment is not applicable to suits for the return of seized property. In this regard, it is particularly significant that the MSSIC funds, now MDIF funds, have never been in the State Treasury.

MSSIC had the power to sue and be sued. *See* §10-104(a), FI, Code (1980), *supra*; §2-103(2), Md. Corps.

& Ass'ns, Code (1985). This power to be sued was "transferred" by express legislative provision to MIDF. Acts, Chp. 6, Section 4.

MDIF is the successor corporation to MSSIC. Section 4, ch. 6, Acts. 1985, 1st Spec. Sess., provides:

> 'that upon May 18, 1985: (i) the Maryland Savings-Share Insurance Corporation shall be and is hereby merged into the State of Maryland Deposit Insurance Fund Corporation, with the State of Maryland Deposit Insurance Fund Corporation as the surviving corporation, without need of the execution of filing of any confirmatory or other articles or instruments; and (ii) all of the assets, including but not limited to capital deposits, reserves, and other tax attributes, all of the liabilities, including but not limited to taxes, incurred losses, and other insurance liabilities, and all of the *rights, powers, duties, obligations, and functions* of the Maryland Savings-Share Insurance Corporation are hereby transferred to the State of Maryland Deposit Insurance Fund Corporation, to the extent consistent with this act, on May 18, 1985. Wherever in the Code the terms 'Maryland Savings-Share Insurance Corporation' or 'MSSIC' appear, they shall be construed to mean the State of Maryland Deposit Insurance Fund Corporation.' [Emphasis supplied].

Section 5 of ch. 6 provides:

> 'that all savings and loan associations that were members of the Maryland Savings-Share Insurance Corporation immediately prior to

> the enactment of this act shall automatically become members of the State of Maryland Deposit Insurance Fund Corporation on the effective date of this act.' §10-101, editor's note, FI Code (1985).

MSSIC was subject to the Maryland General Corporation Law. MDIF, as the successor corporation, is liable for all of the debts and obligations of MSSIC. § 3-114, Corps. & Ass'ns, Code (1985), *supra*.

Thus, the Maryland Legislature, in creating MSSIC, expressly provided that MSSIC was subject to suit and, by special legislative act, expressly transferred that "power" to MDIF, thereby waiving any sovereign immunity claims by either entity.

MSSIC had previously exercised its power to sue in federal court in this Court in *United States v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970), in which it sought the benefit of exemption from taxation as a non-profit corporation pursuant to §501(c)(14)(B) of the Internal Revenue Code of 1954. MSSIC also raised governmental immunity issues in that suit. As stated by this Court:

> [*We* also find unpersuasive MSSIC's remaining argument that it is an instrumentality of the State] and hence entitled to exemption from federal taxation under the doctrine of intergovernmental immunity and under §§115 (a)(1) of the Code, 26 USC §§115 (a)(1). The District Court properly rejected this argument. *Id.* at 7, n. 2. (Emphasis supplied)

The Court of Appeals and the District Court failed to recognize the precedential authority of this Court's

prior decision. In fact, neither Court addressed the effect of the earlier opinion of this Court regarding the nature of MSSIC.

It would make no sense to attribute to the Maryland Legislature an intent to circumvent all of MSSIC's liabilities and duties by creating MDIF as a successor to MSSIC. Such clearly would admit a devious, as well as unconstitutional, dimension to the Act. Therefore, construing the Act consistent with its express purposes, one must conclude that the Legislature intended MDIF to be subject to all of the liabilities that MSSIC had incurred. One of these liabilities included the contractual obligation to repay John Hanson its funds paid into the CIF. The State consented to this suit.

Interestingly, the State and MDIF argued below that the State did not waive its sovereign immunity in creating MDIF because of a subsequent legislative "clarification" which became effective April 3, 1986, subsequent to the filing of John Hanson's action on March 25, 1986. That provision states that MDIF "retains and may raise the defense of sovereign immunity." It also provides that "[t]he General Assembly did not intend waiver of immunity by any of the Acts of the First Special Session of 1985." 1986 Md. Laws, Ch. 12 §3.12.

This legislative enactment, aggressively lobbied for and obtained by the State in the last days of the 1986 Maryland legislative session, confirms rather than refutes John Hanson's position that the Legislature originally intended that MDIF should be subject to suit for all the liabilities of MSSIC which it expressly assumed. The Maryland General Assembly in enacting the sovereign immunity rider was accommodating the

State by correcting what was clearly expressed in the Act as the Legislature's intent that the defense of sovereign immunity was waived with respect to existing MSSIC liability.

Accordingly, the Eleventh Amendment rights of Appellees have been waived.

In *Lankford v. Platte Iron Works*, 316 U.S. 461 (1915) suit was brought by a non-citizen to recover from a state banking board a deposit in an insolvent bank out of a depositor's guaranty fund. A divided court (5-4) held that the Eleventh Amendment barred the suit. In a dissent by Mr. Justice Pitney, the minority stated that the Eleventh Amendment did not apply because the fund was not public property and there was an expectation of recovery by the depositors. As stated in the dissent at 316 U.S. at 479:

> It seems to me clear that, by the language and evident meaning of this law, the state has no property interest in the guaranty fund. No part of its is raised through general taxation, nor can any part of it be lawfully placed in the treasury of the state, or devoted to any of the ordinary purposes of the government, or to any purpose other than the payment of depositors. The state, it is true, through the banking commissioner, holds the bare legal title to the fund, and enforces in the name of the state the liabilities of the failed banks, but this is done for the sole benefit of the fund. Thus, the state has title only, but without real ownership.

The same observations apply to the case at bar. The state has no property interest in the MDIF fund. No

part of it is raised through general taxation nor can any part of it be lawfully placed in the state treasury, or devoted to any of the ordinary purposes of the government. Likewise, there was a reasonable expectation of recovery by John Hanson and other depositors to the CIF.

This is not an action which "in essence is one for the recovery of money from the State," *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945), nor a private suit which "would impose a liability which must be paid from public funds in the State Treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Rather, in this action, John Hanson seeks to recover monies which have never been in the Maryland State Treasury, but which were wrongfully seized by the State from MSSIC and are being held by MDIF. The Eleventh Amendment does not bar suit where a state wrongfully *seizes* monies. As noted above, the MSSIC funds, now MDIF funds, were never in the State Treasury. They were funds contributed by private savings and loan associations to a private regulatory body of the savings and loan industry to insure deposits in member associations. The funds were never intended to be dedicated to public use and only came under the control of MDIF and the State of Maryland through extraordinary governmental acts. Providing the State and MDIF the benefit of Eleventh Amendment immunity under the circumstances of these cases is tantamount to admitting the inviolability of governmental actions seizing private property for a public use without just compensation.

CONCLUSION

WHEREFORE, Petitioner, John Hanson Savings and Loan, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this matter on February 24, 1987.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 86-3607 (L)

JOHN HANSON SAVINGS & LOAN, INC.,
Plaintiff-Appellant,

and

SECOND NATIONAL BUILDING & LOAN, INC.,
Plaintiff,

versus

STATE OF MARYLAND; STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
Defendant-Appellees.

No. 86-3608

SECOND NATIONAL BUILDING & LOAN, INC.,
Plaintiff-Appellant,

and

JOHN HANSON SAVINGS & LOAN, INC.,
Plaintiff,

versus

STATE OF MARYLAND; STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION
Defendant-Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (CA-86-934-R)

Argued: February 5, 1987 Decided: February 24, 1987

Before WINTER, Chief Judge, RUSSELL, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

Jack L. Harvey (Edward S. Diggs, Jr.; Digges, Wharton & Levin on brief); Carlton M. Green (Richard C. Daniels; Green, Loboudger & Daniels on brief) for Appellants; Dennis Michael Sweeney, Deputy Attorney General (Stephen H. Sachs, Attorney General on brief) for Appellees.

PER CURIAM:

John Hanson Savings and Loan, Inc. (Hanson) and Second National Building and Loan, Inc. (Second) sued the State of Maryland and State of Maryland Deposit Insurance Fund Corporation (MDIFC) to compel them to pay to Hanson and Second monies which MDIFC possessed as the successor of Maryland Savings Share Insurance Corporation (MSSIC), and insurer of the savings accounts of members of state-chartered savings and loan associations, to which Hanson and Second had contributed the amounts sought to be returned.* The district court ruled that suit was barred by the Eleventh Amendment. Hanson and Second appeal, and we affirm.

The district court carefully considered the facts and the law as to whether the suit was barred by the Eleventh Amendment on the grounds that the state itself was a defendant and MDIFC was properly deemed an agency of the state, and whether the state had consented to be sued

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* At its inception the suit sought recovery of contributions to both the so-called Central Reserve Fund and the Insurance Fund. Contributions to the Central Reserve Fund have now been refunded, and this aspect of the litigation is moot.

in federal court. We think the district court correctly decided that the Eleventh Amendment bars any action, whether legal or equitable, against the state of Maryland absent its consent. Hans v. Louisiana, 134 U.S. 1 (1890); Ex Parte Young, 298 U.S. 123 (1908). It also correctly decided that MDIFC is a state agency and that Maryland had not consented to suit against MDIFC in a federal court.

We therefore affirm for the reasons set forth in the district court's memorandum and order. Second National Building & Loan, Inc. v. State of Maryland, et al.; John Hanson Savings & Loan, Inc. v. State of Maryland, et al., Civ. Nos. R-86-934 and R-86-985, D. Md. (August 1, 1986) (unreported).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-86-934

SECOND NATIONAL BUILDING & LOAN, INC.,
Plaintiff,

v.

STATE OF MARYLAND and STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
Defendants.

CIVIL ACTION NO. R-86-985

JOHN HANSON SAVINGS & LOAN, INC.,
Plaintiff,

v.

STATE OF MARYLAND and STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
Defendants.

MEMORANDUM AND ORDER

Between February and mid-March of 1985 a silent run took place on certain Maryland savings and loan associations triggering a statewide savings and loan crisis. During that period, approximately $375 million in deposits were withdrawn from state chartered savings and loans insured by the Maryland Savings Share Insurance Corporation ("MSSIC"). *See* W. Preston, *Report of the Special Counsel on the 1985 Savings and Loan Crisis*, 23 (1986) ("Preston report"). On May 8 and 9, 1985 media reports of a change

in management at the Old Court Savings and Loan ("Old Court") and a criminal investigation into its management brought the runs out into the open. *Id.* at 24. The runs soon escalated and spread to other institutions. On May 10, 1985, depositors withdrew 3 million dollars from the Merritt Commercial Savings and Loan Association ("Merritt"). (Affidavit of John D. Hall, Comptroller of the Maryland Deposit Insurance Fund, Exhibit 1 to defendants' motion for summary judgment at pp. 3, 4) ("Hall affidavit"). Last minute meetings between State officials and members of the Federal Reserve to save Old Court and Merritt proved futile. *See* Preston report at 24. On May 13, 1985, at 1:00 a.m., a conservator was appointed for Old Court. *Id.* Merritt followed into conservatorship the next day. *Id.*[1] On May 14, 1985, Maryland Governor Hughes proclaimed that a state of emergency existed in the State savings and loan industry and suspended withdrawals from MSSIC insured institutions. *Id.* However by mid-May, approximately 630 million dollars had already been withdrawn from MSSIC associations. *See* Hall affidavit at p. 4.

In response to the savings and loan crisis, the Maryland General Assembly convened for an extraordinary session. One of the problems facing the General Assembly was how to preserve public confidence in the MSSIC insured institutions after the runs on the savings and loan associations rendered MSSIC insolvent. It was decided that the State would take over MSSIC and insure depositor accounts until such a time when the remaining solvent associations could obtain federal insurance. On May 18, 1985, the General Assembly passed House Emergency Bill No. 6 creating the Maryland Deposit Insurance Fund Corporation ("MDIF")

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[1] Old Court and Merritt were not the only troubled spots in Maryland's savings and loan crisis. Conservators were appointed for three other savings and loan associations, Community Savings and Loan, First Maryland Saving and Loan, and Ridgeway Savings and Loan before the end of 1985.

as a successor corporation to MSSIC. *See* 1985 Md. Laws, Ch. 6 (First Special Session).[2]

The merger of MSSIC into MDIF was effected specifically by uncodified §4 of Ch. 6. That section further provided that:

> all of the assets, including but not limited to capital deposits, reserves, and other tax attributes, all of the liabilities, including but not limited to taxes, incurred losses, and other insurance liabilities, and all of the rights, powers, duties, obligations and function of the Maryland Savings Share Insurance Corporation are hereby transferred to the Maryland Deposit Insurance Fund, to the extent consistent with this Act . . . .

Plaintiffs John Hanson Savings and Loan, Inc. ("John Hanson") and Second National Building and Loan, Inc. ("Second National") bring the instant litigation against MDIF and the State of Maryland seeking the return of money which they contributed to the reserve and insurance funds of MSSIC.[3] As members of MSSIC, John Hanson and Second National were required to make payments into a Central Reserve Fund ("CRF") and a Central Insurance Fund ("CIF"). The CRF was established by MSSIC and its member associations to provide for needed liquidity of

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[2] Chapter 6 repealed Md. Fin. Inst. Code Ann. Title 10 (MSSIC) and enacted a new title codified as Md. Fin. Inst. Code Ann. Title 10 (MDIF) (Supp. 1985).

[3] The Chevy Chase Savings and Loan Inc. ("Chevy Chase") brought and earlier suit in state court against Maryland and MDIF seeking to recover funds which it paid to MSSIC's insurance and reserve funds. On June 5, 1986, the Court of Appeals of Maryland held that Chevy Chase was not entitled to the return of its insurance fund contributions unless moneys remained in the fund after depositor-related insurance losses are paid. The Court also held that the Act creating MDIF did not impair any constitutionally protected contract rights. *See Chevy Chase Savings & Loan, Inc. v. State of Maryland, et al.*, No. 9 September Term, 1986 (Slip Op., June 5, 1986).

member associations. Payments to the CIF were designed to insure depositor savings accounts in MSSIC institutions. Pursuant to MSSIC bylaws, member associations were entitled to the return of their payments made to the CRF and CIF upon withdrawing from MSSIC. *See* MSSIC Rules and Regulations §3-901(B)(6) (return of payments made to CRF) and §3-503 (return of payments made to CIF). Both John Hanson and Second National have withdrawn from MSSIC and now seek the return of their contributions made to the reserve and insurance funds.

The MDIF statute, however, does not require MDIF to adhere to old MSSIC by-laws.[4] Moreover, Section 10-112(b) as amended by Chapter 9, Laws of Maryland (1st Special Session) specifically made the return of CFR and CIF contributions subject to the terms and conditions adopted by the Fund Director and approved by MDIF's Board of Directors. On October 24, 1985 the Board of Directors at MDIF met in order to review the status of the CRF. At the meeting, the MDIF Board adopted resolution 85-1 which reads:

> A. Because of the extent of currently anticipated losses, MDIF will not return capital deposits in the insurance fund to withdrawing members until the amount of currently anticipated losses is determined.
>
> B. Because of the current illiquid state of the central reserve fund, the consideration of member contributions as assets by [FSLIC] and the payment of interest to members on the contributions, MDIF will not return contributions to withdrawing members before it has determined that there will be no loss to the fund in liquidating its assets and

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[4] MDIF was required to adhere to the MSSIC provision requiring that deposits be insured on a "per account" basis. *See* Chapter 6, Laws of 1985 (1st Special Session).

that the contributions will not be needed to assist members who are experiencing liquidity problems.

On January 10, 1986, the Sate Administration announced its plan to aid depositors of the troubled savings and loans. The plan called for the use of all liquid assets in MDIF's Insurance Fund, approximately 80 million dollars, but did not call for using any CRF assets. The budget plan, as adopted, also contained a special appropriation of 92.4 million dollars to the CRF. The purpose of the appropriation was to permit MDIF to refund MSSIC institutions' contributions to the CRF by December 31, 1986.

Presently before the Court is the State of Maryland's and the State of Maryland Deposit Insurance Fund Corporations's ("State defendants") motions to dismiss or in the alternative for summary judgment on the complaint filed by Second National in civil case no. R-86-934 and on the complaint filed by John Hanson in civil case no. R-86-985.[5] Plaintiffs have opposed and the State has filed a memorandum in reply. The issues are thoroughly briefed and the Court now rules pursuant to Local Rule 6 (D. Md. 1985).

Rule 12(b) of the Federal Rules of Civil Procedure provides that when a motion to dismiss a pleading for failure to state a claim upon which relief can be granted is presented to the Court with matters outside of the pleadings, the motion is treated as one for summary judgment and

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[5] The legal claims in the actions brought by Second National and John Hanson against the State defendants are virtually identical. *See* Second National's memorandum in opposition to defendants' motion to dismiss at 4. Both complaints contain counts alleging an unconstitutional taking, and unconstitutional impairment of contract and an unconstitutional interference with interstate commerce under the United States Constitution. Both complaints contain counts alleging various violations of the Maryland Constitution. Finally both complaints allege causes of action for breach of contract and for an accounting under Maryland law.

disposed of as provided in Rule 56. In order to grant a motion for summary judgment under Rule 56 there must be "no genuine dispute as to any material fact and ... the moving party [must be] entitled to a judgment as a matter of law." Fed.R.Civ.P. 56; *Celotex Corp. v. Myrtle Nell Catrett,* 54 U.S.L.W. 4775, 4777 (1986); *National Constructors Ass'n v. National Contractors Ass'n, Inc.,* 498 F.Supp. 510, 529 (D. Md. 1980), *modified on other grounds,* 678 F.2d 492 (4th Cir. 1982). In addition, there should be "no disagreement as to the inferences which may be drawn from the undisputed facts" *Steinberg v. Elkins,* 470 F.Supp. 1024, 1030 (D. Md. 1979). The burden is on the moving party and any doubts as to the existence of a genuine issue of material fact will be resolved against the movant. *See Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970). *See also Ross v. Communications Satellite Corp.,* 759 F.2d 355, 364 (4th Cir. 1985), *Charbonnages de France v. Smith,* 597 F.2d 406, 414 (4th Cir. 1979). State defendants off numerous arguments in support of their motion to dismiss or for summary judgment. Because the Court finds that the Eleventh Amendment bars this Court's jurisdiction over plaintiffs' claims against the State of Maryland and MDIF, defendants' remaining arguments will not be addressed.

"The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Nevada v. Hall,* 440 U.S. 410, 414 (1978). Accordingly, the issue before this Court is not "the general immunity of the States from private suit" but rather the "susceptibility of the States to suit before federal tribunals." *Employees v. Missouri Dept. of Public Health and Welfare,* 411 U.S. 279, 294 (1973) (Marshall J. concurring in result). In deciding whether the exercise of federal judicial power is appropriate, the Court must consider "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Id.*

It is now well established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The doctrine of sovereign immunity has its roots in the feudal system where it was believed that "the King could do not wrong." *See Nevada*, 440 U.S. at 414. Although the colonists rejected this fiction when they declared their independence from the Crown, the doctrine of sovereign immunity played a prominent role in constitutional debate. *Edelman*, 415 U.S. at 660 n. 9.[6]

After the Revolutionary War, many of the States found themselves heavily indebted. As such, they were fearful that they would be called upon to answer for those debts in the courts of the newly created federal sovereign. *Nevada*, 440 U.S. at 418. It was largely owing to the successful dissapation of that fear by advocates for the new federal government, that the Constitution was finally adopted. *Edelman*, 415 U.S. at 660 (quoting 1 C. Warreh, The Supreme Court in United States History 91 (rev. ed. 1937). For example, in the Federal ist No. 81, Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the con-

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[6]The debate about whether the judicial power of the United States encompassed suits brought by individuals against the States focused on the scope of Article III, §2, of the Constitution. Article III, §2, provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity . . . between a State and Citizens of another State.

> vention, it will remain with the States, and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. The confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.[7]

However, shortly after the ratification of the Constitution, the Supreme Court in *Chisholm v. Georgia,* 2 Dall. 419 (1793) held that federal jurisdiction encompassed a suit brought against a non-consenting State by citizens of another State. That decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco v. Mississippi,* 292 U.S. 313, 325 (1934). The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

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[7] For a general discussion on the debate of the framers advocating the preservation of sovereign immunity of the States after Article III *see* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines; Part One,* 126 U. Penn. L.Rev. 515, 527-536 (1978).

> the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment, however, did no more than "clarify the intent to the framers concerning the reach of the federal judicial power" and "restore the original understanding" that States could not be made unwilling defendants in federal court. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 98 n. 7 (1984) quoting *Employees,* 411 U.S. at 291-292. As Justice Marshall explained in *Employees, supra,* "[i]t had been widely understood prior to the ratification of the Constitution that the provision in Art. III, §2, concerning controversies . . . between a State and Citizens of another State would not provide a mechanism for making States unwilling defendants in federal court." 411 U.S. at 291, 292.

In the instant case, plaintiffs bring their claims against the State of Maryland and MDIF. Obviously plaintiff's claims against the State of Maryland are barred by the Eleventh Amendment and this Court and others have previously held that MDIF is an agency of the State. *See American Casualty Co. of Reading, Pa. v. Community Savings and Loan, Inc.,* Civil No. R-85-4615, Slip op. at 3-4 (D. Md. Apr. 15, 1986) (Ramsey J.), *see also Foremost Guaranty Corp. v. EPIC Mortgage, Inc., C.A.,* 85-1298-A (E.D. Va. Mar. 24, 1986) (Hilton J.) transcript of opinion at 16,17; *Community Savings & Loan, Inc., v. Citibank N.A.,* Civ. No. M-85-4005 (D. Md. Oct. 10, 1985) (Miller, J.) transcript of opinion at 4.[8] The Maryland Court of

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[8] In *American Casualty, supra,* this Court examined MDIF's relationship with the State of Maryland and determined that MDIF is an arm of the State. Slip Op. at 2, 3.

MDIF was created as a part of the Department of Licensing and Regulation. Md. Fin. Inst. Code Ann. §10-102 (Supp. 1985). That department is "a principal department of the state government." Md. Ann., Code Art. 41, §221a (1982). MDIF is subject to virtually complete government control. MDIF's Director is appointed by the Governor,

Appeals also concluded that MDIF is an agency of the State. *Chevy Chase Savings & Loan, Inc. v. State of Maryland, et al.*, No. 9, Sept. Term, 1986 (Slip op. at 8, June 5, 1986). Accordingly, absent consent, or an express waiver by the State of its constitutional immunity from suit in federal court, plaintiffs are barred from bringing the instant litigation regardless of the source of their claims. *Employees*, 411 U.S. at 293 n. 8.

An action may be brought in the federal courts against a State which consents to the suit or expressly waives its sovereign immunity. *Pennhurst*, 465 U.S. at 99. However, the State's consent to suit must be unequivocally expressed, and its waiver of Eleventh Amendment protection will only be found "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673 quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

In the instant cases, Chapter 6 of the Acts of the First Special Session of 1985, which created MDIF provides *inter alia* that "all of the rights, powers, duties, obligations, and functions of [MSSIC] are hereby transferred to [MDIF],

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Md. Fin. Inst. Code Ann. §10-103(a) (Supp. 1985); he serves at the pleasure of the Secretary of Licensing and Regulation, *Id.* §10-105; the Director and his staff are paid from State funds, *Id.*, §10-104(a); and the majority of the members of MDIF's Board of Directors are appointed directly by the Governor, *Id.* §10-103(d)(2)(ii). The Director's hiring authority is governed by State budgetary constraints. *Id.* §10-104(a).

MDIF is "exempt from all special and ordinary taxes" imposed by the State. Section 7, ch. 6, Acts. 1985, 1st Sp. Sess. MDIF's Director is granted qualified immunity. *Id.* Section 9, ch. 6. Any net earnings of MDIF are to be "accumulated for the benefit of the State." Md. Fin. Inst. Code Ann. §10-112(c) (Supp. 1985). And it is the statutory policy of the State to appropriate funds to MDIF "to the extent necessary to protect holders of savings accounts in member association." *Id.* §10-116.

to the extent consistent with this Act . . ." [emphasis added]. Although MDIF may have assumed the obligations and functions of MSSIC, there is no indication in the statute that the General Assembly intended to waive MDIF's sovereign immunity for Eleventh Amendment purposes. Moreover, the Act expressly provides that MSSIC's duties and obligations were transferred to MDIF to the extent consistent with the Act and the waiver of MDIF's sovereign immunity is not consistent with the Act because such would invite disruptive federal intervention with the carefully conceived mechanism created by the State for resolving the savings and loan crisis. Without consent to the suit by the State or a waiver of its sovereign immunity, this Court is powerless to hear plaintiff's claims. Accordingly, this Court must find that the principles of federalism inherent in the Eleventh Amendment doctrine bar plaintiffs from bringing their claims in this Court.

Plaintiffs, however, are not left without a forum to litigate their claims. In the *Chevy Chase* decision the Maryland Court of Appeals expressly refused to rule on State defendants' sovereign immunity defense thereby leaving Maryland courts open as forum for litigation brought against the State of Maryland and MDIF. *Chevy Chase,* No. 9 Sept. Term, 1986 Slip Op. at 16.[9] It is well established that state courts of general jurisdiction have the power to decide cases involving federal constitutional rights where neither the Constitution nor Act of Congress withdraws such jurisdiction. *See Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 477 (1981); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 320 (1977); *Caflin v. Houseman,* 93 U.S. 130, 136-139 (1876). In the instant cases, there are no constitutional or statutory bars preventing plaintiffs from litigating their federal claims in

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[9] A State's waiver of sovereign immunity in its own courts does not constitute a waiver Eleventh Amendment immunity in federal courts. *Pennhurst,* 465 U.S. at 99 n. 9.

state court. Accordingly defendants' motions to dismiss are granted and plaintiffs are free to bring any challenges including state and federal constitutional challenges to the MDIF statute in state courts of Maryland.

For the reasons stated herein, it is this 1st day of August, 1986, by the United States District Court for the District of Maryland,

ORDERED:

1. That the State of Maryland and the State of Maryland Deposit Insurance Fund Corporation's motion to dismiss or for summary judgment in the case, *Second National Building & Loan, Inc. v. State of Maryland, et al.*, Civ. No. R-86-934 is hereby GRANTED;

2. That the State of Maryland and the State of Maryland Deposit Insurance Fund Corporation's motion to dismiss or for summary judgment in the case, *John Hanson Savings & Loan, Inc. v. State of Maryland, et al.*, Civ. No. R-86-985 is hereby GRANTED; and

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

/s/ Norman P. Ramsey
Norman P. Ramsey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-86-934

SECOND NATIONAL BUILDING & LOAN, INC.,
Plaintiff,

v.

STATE OF MARYLAND and STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
Defendants.

CIVIL ACTION NO. R-86-985

JOHN HANSON SAVINGS & LOAN, INC.,
Plaintiff

v.

STATE OF MARYLAND and STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
Defendants.

JUDGMENT ORDER

In accordance with the Court's Memorandum and Order of August, 1986, and filed in the above-entitled cases, it is this 1st day of August, 1986, by the United States District Court for the District of Maryland,

ORDERED AND ADJUDGED:

That judgment is entered in favor of the defendants and against the plaintiffs.

/s/ Norman P. Ramsey
Norman P. Ramsey
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUN 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HANSON SAVINGS AND LOAN, INC.,
Petitioner,

v.

STATE OF MARYLAND AND STATE OF MARYLAND DEPOSIT INSURANCE FUND CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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June 17, 1987

The Daily Record Co., Baltimore, MD 21202

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals correctly hold that the Eleventh Amendment bars a claim by a savings and loan association against the State of Maryland and the State of Maryland Deposit Insurance Fund Corporation for the return of monies needed by the State to prevent depositor losses and to remedy the effects of a statewide savings and loan crisis?

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NO. 86-1862

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN HANSON SAVINGS AND LOAN, INC.,
Petitioner,

v.

STATE OF MARYLAND AND STATE OF MARYLAND
DEPOSIT INSURANCE FUND CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

John Hanson Savings and Loan, Inc.

("John Hanson") sued the State of Maryland ("the State") and the State of Maryland Deposit Insurance Fund Corporation ("MDIF")[1/] seeking the return of monies possessed by MDIF as the successor of the Maryland Savings Share Insurance ("MSSIC"), which was an insurer of savings accounts of state-chartered savings and loan associations that included John Hanson. (App. at 2a).[2/] John Hanson had deposited monies with MSSIC for the insurance of its accounts. (App. 2a, 6a).

In May, 1985, the private insurance system for 102 Maryland savings and loan associations collapsed. The collapse was preceded by massive withdrawals from the associations insured by MSSIC. (App. at 4a-5a). In the

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[1/] Pursuant to Supreme Court Rule 28.1, MDIF is an agency of the State of Maryland with no parent companies, subsidiaries or affiliates.

[2/] Citations in the form "App. at ___" are to the appendix to John Hanson's petition for certiorari.

three-month period ending in mid-May, approximately $630 million was withdrawn from these associations. (App. at 5a).

In an effort to deal with the crisis in the MSSIC insured savings and loan associations, the Governor issued executive orders limiting withdrawals from MSSIC insured institutions and calling a special session of the Maryland General Assembly. (App. at 5a).

The special session was devoted exclusively to the savings and loan crisis and enacted various emergency laws designed to stabilize the industry and establish depositor confidence. Among the laws enacted was Chapter 6 of the Laws of 1985 (1st Special Session) which replaced MSSIC with a new State agency, MDIF, and conferred upon the latter all of MSSIC's powers, duties and insurance liabilities "to the extent consistent with the Act." The new agency also took over the two MSSIC funds which had been

financed by contributions from MSSIC member associations. (App. at 5a-6a). One of these funds, the Central Insurance Fund ("Insurance Fund"), is the subject of John Hanson's petition. 3/

The Insurance Fund had as its purpose the insurance of accounts of depositors of member associations. (App. at 7a). Under the MSSIC system, this fund was capitalized by deposits equal to two percent of the amount of each MSSIC member's savings accounts.

The MSSIC statute had been silent on the rights of member associations to the return of their contributions to the Insurance Fund. MSSIC bylaws did provide a procedure for individual institutions to obtain access

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3/ At the time it filed suit, John Hanson also sought the return of contributions made to the Central Reserve Fund. The Fourth Circuit stated that these contributions "have now been refunded, and this aspect of the litigation is moot." (App. at 2a). John Hanson concurs with this statement. Petition at 2 n.2.

to the contributions. However, even these rules contained no provision governing fund distribution in times of crisis and of contemplated losses of massive proportion; nor did they remotely envision the statutorily mandated exodus of member institutions from MSSIC into the federal insurance system and the legal dissolution of MSSIC.

Under the legislation creating MDIF, the purposes of the Insurance Fund were broadened, Md. Fin. Inst. Code Ann., §10-110(a)(2) (Supp. 1986), and the new laws specifically made the return of Insurance Fund contributions "subject to terms and conditions adopted by the Fund Director and approved by the Board." Md. Fin. Inst. Code Ann., §10-112(b) (Supp. 1986).

In light of the huge anticipated insurance losses which greatly outstripped

the Insurance Fund resources,[4/] and the clamor by savings and loans for the return of their contributions to the Fund, the MDIF Board of Directors issued the following resolution on October 24, 1985:

> Because of the extent of currently anticipated losses, MDIF will not return capital deposits in the insurance fund to withdrawing members until the amount of currently anticipated losses is determined.

(App. at 7a).

The MDIF Insurance Fund monies supplemented by huge State appropriations have been utilized to either support the sale of troubled institutions, to fund the assumption by financial institutions of liability for insured deposits, or to fund partial distributions to insured depositors. Because the

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[4/] As of May 13, 1985, the losses at one savings and loan alone were estimated to be approximately $206 million, well exceeding the total Insurance Fund amount of $175 million.

liabilities of the Fund to insured depositors greatly exceed the assets that MSSIC had required to be placed in the Fund, there will likely not be any Insurance Fund monies remaining for a distribution to former MSSIC members.

On September 19, 1985, John Hanson was accepted into FSLIC membership,[5/] and it claims it was entitled to the return of its Insurance Fund Contributions as of September 25, 1985. When John Hanson made demands for the immediate return of its Insurance Fund contributions, its request was denied because the anticipated losses to the Insurance Fund vastly exceeded the Fund's balance.

5/ John Hanson was accepted into FSLIC primarily because the State of Maryland allowed it to utilize State backed bond anticipation notes exceeding $11,000,000 to meet FSLIC's net worth requirements. Without this State supplied financial pledge, John Hanson would have been denied FSLIC membership.

John Hanson filed suit in the United States District Court for the District of Maryland. The State and MDIF moved to dismiss John Hanson's complaint on the ground, among others, that the Eleventh Amendment barred John Hanson's claim for the return of its monies. The district court agreed and entered judgment in favor of respondents. (App. at 16a-17a). On appeal, the Fourth Circuit affirmed, holding that MDIF is an agency of the State and that the Eleventh Amendment barred this action because the State did not consent to suit against MDIF in federal court. (App. at 2a-3a). John Hanson's petition to this Court followed.

REASONS FOR DENYING THE WRIT

Further review of this case is plainly unwarranted. John Hanson now asserts a new claim not asserted in either of the courts below, and the petition presents no novel or unsettled questions on which the federal

courts require the guidance of this Court. The decisions below conform with prior decisions of this Court, and no sound reason exists for disturbing the decision of the Fourth Circuit.

A. Petitioner asserts a claim not raised in the courts below.

The first question John Hanson presents for review is whether the Eleventh Amendment bars a suit in federal court against a state by one of its own citizens. Aside from the fact that this Court has directly answered this question in the affirmative on numerous occasions, see Papasan v. Allain, 106 S.Ct. 2932, 2939 (1986); Employees v. Department of Public Health & Welfare, 411 U.S. 279, 280 (1973); Hans v. Louisiana, 134 U.S. 1 (1890), John Hanson failed to raise this question below, and so has waived the right to raise it in its petition. See Dothart v. Rawlinson, 433 U.S. 321, 323 n.1 (1977);

Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); see also Irvine v. California, 347 U.S. 128, 129 (1954).

B. The Fourth Circuit's decision holding that petitioner's suit is barred by the Eleventh Amendment is unquestionably correct and is in full accord with numerous decisions of this Court.

The Eleventh Amendment to the United States Constitution prevents a state or its agencies and entities from being sued in federal court without their consent. Ex parte State of New York No. 1, 256 U.S. 490, 497 (1921). It precludes the assertion of state law claims as well as federal claims, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); equitable relief as well as legal and monetary relief, Corey v. White, 457 U.S. 85, 91 (1982); has been held to bar actions against a state for violations of the Contract Clause, Hans v. Louisiana, 134 U.S. 1 (1890); and the

Commerce Clause, Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); and "bars suits against a State by citizens of that same State as well." Papasan v. Allain, 106 S.Ct. at 2939.

John Hanson can only survive this constitutional bar if this suit were really not one against the State or its alter ego or if the State had waived its immunity. However, the petitioner cannot mount a credible position on either count and the courts below properly found this suit barred by the Eleventh Amendment.

1. MDIF is an Agency of the State of Maryland.

John Hanson did not sue an officer or a person, but filed this action directly against the State of Maryland and MDIF. It argues at length that MSSIC, the statutory predecessor of MDIF, was not a State agency. However, by the time its claim arose

and its action was filed in federal court, MSSIC was insolvent and had been abolished by the State legislature which established MDIF, a State agency, as its successor.

MDIF, the entity the General Assembly of Maryland created out of MSSIC's ashes, bears every indicia of a State agency. MDIF was created by law and placed within a principal department of State government, the Department of Licensing and Regulation, Md. Code Ann., Art. 41, §8-102. It is subject to direct and extensive governmental control. MDIF and its Fund Director are appointed by the Governor and/or the Secretary of Licensing and Regulation. Md. Fin. Inst. Code Ann., §10-103 (Supp. 1986). Its employees are State employees. §10-104 (Supp. 1986) and §10-116 (Supp. 1986). The power to accept associations as MDIF members is subject to approval by the State Division of Savings and Loan Associations in §10-111

(Supp. 1986).

Additionally, by insuring depositor accounts and preserving the liquidity of member institutions, MDIF is serving an important public purpose associated with the State's exercise of the police power for the general welfare of its citizens. See Veix v. Sixth Ward Building and Loan Assoc., 310 U.S. 32 (1940); Noble State Bank v. Haskell, 219 U.S. 104 (1911); Assaria State Bank v. Dolley, 219 U.S. 121 (1911); Md. Fin. Inst. Code Ann., §8-102 (Declaring that the savings and loan business is affected with the public interest and shall be "supervised as a business affecting the economic security and general welfare of the people of this State."); see also Lankford v. Platte Iron Works Co., 235 U.S. 461 (1915) (Holding a decree directing a State banking board to repay a deposit in an insolvent bank out of a legislatively-created depositors' guaranty

fund financed by associations' contributions to be a suit against the State barred by the Eleventh Amendment).

Finally, every state and federal court that has examined MDIF's status as an insurer and regulator has concluded that it is a State agency. See Chevy Chase Savings and Loan, Inc. v. State, 306 Md. 384, 393, 509 A.2d 670, 674-675 (1986); United Wire v. State Deposit Ins. Fund, 307 Md. 148, 151, 512 A.2d 1047, 1048 (1986); Levitt v. MDIF, 643 F.Supp. 1485 (E.D.N.Y. 1986)("MDIF is an agency of the State of Maryland under the Eleventh Amendment"). Thus, MDIF, just like the State itself, is entitled to the protection of the Eleventh Amendment in this case.

2. The State has not waived its Eleventh Amendment immunity.

> "The test for determining whether a State has waived its immunity from federal court jurisdiction is a stringent one. . . .[I]n order for a state statute or constitutional pro-

> vision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court." Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3147 (1985).

In contending that the General Assembly of Maryland by statute waived MDIF's entitlement to Eleventh Amendment protection, John Hanson has failed to come to grips with this test, let alone to apply it in a correct fashion.

Simply because MDIF inherited MSSIC's power to sue and be sued and undertook a limited assumption of certain MSSIC obligations, see Chevy Chase Savings and Loan, Inc. v. State, 306 Md. at 409, 509 A.2d at 683 ("Under §4 of Ch. 6 [Laws of 1985, 1st Special Session], MDIF assumed MSSIC's obligations, including executory contracts, only to the extent that a given obligation was consistent with Ch. 6."), reveals absolutely no intent to subject the agency to suit in federal court. The language of the

1985 statute creating MDIF is simply not "an unequivocal waiver specifically applicable to federal court jurisdiction," Atascadero State Hosp. v. Scanlon, 105 S.Ct. at 3147, and thus cannot be held to have waived the Eleventh Amendment.

3. The Eleventh Amendment bars suit against the State and its agencies, even when the claim is for the "return of seized property".

When the State and its agencies, as opposed to one of its officers, is named as a defendant in federal court, it makes no difference what the basis is for the litigant's constitutional claims or what relief he or she prays. See Pennhurst State School and Hospital v. Halderman; Corey v. White. The Eleventh Amendment does not, as John Hanson argues, only protect a state from liabilities that must be paid from funds in the state treasury. See Corey v. White, 457 U.S. at 90, n.2. Moreover, it cannot be limited to

federal suits, such as the case at bar, that would interfere with administration of a state policy or statute. See Lankford v. Platte Iron Works Co., 235 U.S. 461, 476 (1915). Rather, the Eleventh Amendment is a restriction on the federal judicial power "based in large part on 'the problems of federalism inherent in making one sovereign appear against its will in the courts of the other.'" Pennhurst State School and Hospital v. Halderman, 465 U.S. at 100 (quoting from Employees v. Missouri Public Health Dept., 411 U.S. 279, 294 (1973)).

Nor does the State's Eleventh Amendment defense disappear in the face of John Hanson's allegations that the Insurance Fund monies sought are not State funds but the institution's money, of which MDIF is a mere custodian. Chapter 6, Laws of 1985 (1st Special Session), placed MSSIC funds and assets within State custody, control, and

discretion for its use to fulfill various public purposes, including the insurance of depositor accounts, the payment of depositor losses, and preservation of the liquidity of member institutions. In addition, the State has appropriated its own monies to this Fund and has used or plans to use Insurance Fund monies to free up frozen depositor accounts at troubled institutions.

Finally, a contention similar to that of John Hanson's was soundly rejected in Lankford v. Platte Iron Works Co., where the Court ordered the dismissal of a suit against members of a state banking board for payments from a "depositors' guaranty fund", despite the contention that "the property is that of the contributing banks and is accumulated in a fund for the security of their respective depositors. . ." 235 U.S. at 473. Noting that the funds in question, although ultimately destined for depositors, were under

the management of the State, the Court said:

> "The fund, having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied." 235 U.S. at 475.[6/]

For all of these reasons, this action is one against the State and its agencies within the meaning of the Eleventh Amendment and, because the State's immunity has not been waived, the courts below correctly concluded that John Hanson's claims should be dismissed.

6/ Even if John Hanson had named State officers as defendants, rather than the State itself and one of its agencies, the State's management and control of MDIF funds, coupled with the fact that if petitioner obtained the requested relief, the State would be obliged to make greater appropriations from the state treasury on behalf of depositors, would make this suit one against the State and thus barred by the Eleventh Amendment. See Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 691, n. 11 (1949); Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 689-90 (1982).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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